

C31WdunC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 CLAUDINE DUNNINGAN, et al.,

4 Plaintiffs,

5 v.

10 CV 4518 (BSJ) (GWG)

6 THE ISLAMIC REPUBLIC OF IRAN,

7 Defendant.

8 -----x
9 New York, N.Y.
March 1, 2012
3:30 p.m.

10 Before:

11 HON. GABRIEL W. GORENSTEIN,

12 Magistrate Judge

13 APPEARANCES

14 SALON MARROW DYCKMAN NEWMAN & BROUDY LLP

15 Attorneys for Peterson Plaintiffs

16 BY: LIVIU VOGEL

-and-

17 STONE BONNER & ROCCO LLP

18 BY: JAMES P. BONNER

-and-

19 STEVEN R. PERLES

-and-

20 FAY KAPLAN LAW P.A.

BY: THOMAS FORTUNE FAY

ANNIE P. KAPLAN

21 STROOCK & STROOCK & LAVAN LLP

Attorneys for Greenbaum and Acosta Plaintiffs

22 BY: JAMES L. BERNARD

BEN WEATHERS-LOWIN

23 DAN GASKILL

24 Attorney for Valore

25 FLEISCHMAN

Attorneys for Valore Judgment Creditors

C31WdunC

BY: JUNE H. PARK

DLA PIPER US LLP

Attorneys for Heiser Creditors

BY: DALE K. CATHELL

C31WdunC

1 CHAFFETZ LINDSEY LLP
2 Attorneys for Defendant Bank Markazi
3 BY: DAVID M. LINDSEY
ANDREAS FRISCHNECHT

4 PATTON BOGGS LLP
5 Attorneys for Defendant Banca UBAE
6 BY: UGO COLELLA
JOHN J. ZEFUTIE, Jr.

7 WHITE & CASE LLP
8 Attorneys for Defendant Clearstream Banking
9 BY: FRANK PANOPOULOS
NICOLE E. ERB

10 DAVIS WRIGHT TREMAINE LLP
11 Attorneys for Defendant Citibank N.A.
12 BY: SHARON L. SCHNEIER
13 CHRISTOPHER J. ROBINSON
14
15
16
17
18
19
20
21
22
23
24
25

C31WdunC

(Case called)

MR. VOGEL: Liviu Vogel, attorney for the Peterson plaintiffs.

MR. BONNER: Jim Bonner, with Stone Bonner & Rocco, also for the Peterson plaintiffs.

MR. BERNARD: James Bernard and Ben Weathers-Lowin, from Stroock & Stroock & Lavan, on behalf of the Greenbaum and Acosta plaintiffs.

MR. CATHELL: Dale Cathell, DLA Piper, for the Heiser creditors, and my colleague David Misler is also participating by phone.

MR. LINDSEY: David Lindsey, Chaffetz Lindsey, for Bank Markazi.

MR. COLELLA: Ugo Colella and John Zefutie, Jr., Patton Boggs, on behalf Banca UBAE.

MR. PANOPOULOS: Frank Panopoulos and Nicole Erb, for Clearstream Banking S.A.

MS. SCHNEIER: Good afternoon, your Honor. Sharon Schneier and Chris Robinson, Davis Wright Tremaine, for Citibank.

THE COURT: Is the person on the phone making an appearance or.

MS. RANKIN: Jessica Rankin for the judgment creditors.

THE COURT: Why don't you say that again.

C31WdunC

1 MS. RANKIN: Jessica Rankin for the judgment
2 creditors.

3 THE COURT: We're here based on a letter from
4 plaintiffs dated February 14 about the briefing schedule. I
5 got letters dated also February 14 from Citibank, February 17
6 from Clearstream, and 21 from Bank Markazi.

7 Obviously I'm not going to decide any of these legal
8 issues now. I wanted to give the parties essentially a chance
9 to propose a new briefing schedule, which at least someone
10 did -- I think it was Markazi -- so that they could take into
11 account the arguments that they've outlined in their letters.
12 I guess the only new thing is that the plaintiffs want to
13 insert a summary judgment motion into the whole thing.

14 Mr. Vogel, right?

15 MR. VOGEL: Correct, your Honor.

16 THE COURT: I'm happy to hear from you on that, but I
17 guess you need to talk about my prior ruling where I set forth
18 the order in which I was going to do this and why that should
19 be changed. If you have to go into the merits in order to do
20 that, so be it, but go ahead.

21 MR. VOGEL: Okay. Your prior order contemplated that
22 there were to be threshold issues to be decided to determine
23 whether the Court had subject matter jurisdiction, and the
24 basis for the claim of lack of subject matter jurisdiction, at
25 least from Clearstream's side, was that under the FSIA Section

C31WdunC

1 1610(a) and (b), for that matter, the Court only has subject
2 matter jurisdiction if the property upon which the judgment
3 creditors seek to enforce their judgment is, in fact, located
4 in the United States and is used for a commercial purpose.
5 That requirement no longer became true as of the February 6
6 executive order signed by Barack Obama which had the effect of
7 blocking the assets, and we know that they were in fact blocked
8 because Citibank wrote a letter.

9 THE COURT: What didn't become true?

10 MR. VOGEL: It no longer became true that the basis of
11 subject matter jurisdiction for this Court is the presence of
12 assets belonging to Iran in the United States used for a
13 commercial purpose. That is no longer the basis for it.
14 1610(a) and (b) is mooted and is trumped by the Terrorist Risk
15 Insurance Act, which in shorthand is called TRIA, and it's a
16 footnote to 1610 and it says basically notwithstanding any
17 other law, TRIA applies. And TRIA applies basically to the
18 property of a terrorist party or its agency or instrumentality
19 and it may be used to satisfy judgment against that terrorist
20 party provided that the plaintiffs have the right kind of
21 judgment, which is the judgment under 1605(a)(7) based on
22 terrorist acts, which we do, and the assets are blocked.
23 That's one of the requirements of TRIA.

24 So once the assets became blocked, that in and of
25 itself, the act of blocking the assets, gave this Court subject

C31WdunC

1 matter jurisdiction without question, regardless of whether the
2 property is here or not here, used for a commercial purpose or
3 not used for a commercial purpose, belongs to Iran or belongs
4 to one of its agencies or instrumentalities like the Central
5 Bank.

6 THE COURT: You say without question. But this is the
7 very thing that's questioned in the later letters, is it not?

8 MR. VOGEL: The other parties do question that issue,
9 but the case law is fairly simple, fairly clear on its face,
10 and the statute itself is quite clear on its face. The subject
11 matter jurisdiction issue no longer exists and essentially
12 becomes an in rem action. Once the asset is blocked, under
13 this statute, the judgment creditors are allowed to take that
14 asset, whoever has it, it happens to be at Citibank, so it
15 doesn't matter anymore whether Clearstream has it or UBAE has
16 it or whether it's here or it's there, it's an asset that's
17 blocked and this statute is specifically intended to benefit
18 creditors, judgment creditors who suffered at the hands of a
19 terrorist party. So it's much simplified now because --

20 THE COURT: And that's fine. I just have to tell you
21 I'm not going to decide this now.

22 MR. VOGEL: I'm not asking your Honor to decide it.

23 THE COURT: If you want to pick out some smaller
24 issue, I'm sure that the other parties will have no problem
25 with that you say is going to answer all the subject matter

C31WdunC

1 jurisdictions and have you just deal with that and if you're
2 wrong, understand that we'll go through the original process as
3 set before where they can raise these other arguments. We can
4 try that.

5 MR. VOGEL: Let me explain. Perhaps I haven't made
6 myself fully clear.

7 The plaintiffs and judgment creditors are not claiming
8 that either Clearstream or the Central Bank of Iran should not
9 be permitted to raise any of these arguments. We're not saying
10 that. We're just saying those arguments, if they wish to raise
11 them, are appropriate to be raised in conjunction with a
12 summary judgment motion because there are no longer any issues
13 of fact.

14 THE COURT: If you do not have a new summary judgment
15 motion that doesn't require any discovery --

16 MR. VOGEL: Correct.

17 THE COURT: -- and for which you will swear on
18 whatever stack of Bibles we have that there will not be a
19 counterstatement excluding any issues of fact, we can talk
20 about that, because I don't think I've heard from any of the
21 parties; I'm not sure they'd care whether you briefed
22 something. The thing I didn't want to have happen before was
23 to have a discovery process, which is what I understood was
24 being required.

25 MR. VOGEL: And my point is we don't need discovery to

C31WdunC

1 make a summary judgment motion.

2 THE COURT: Whatever.

3 MR. VOGEL: It's a partial summary judgment motion.

4 THE COURT: Maybe there won't be an objection to
5 interweaving this into the motion schedule in some way, so let
6 me hear from whoever wants to be heard.

7 MR. LINDSEY: Your Honor, David Lindsey for Bank
8 Markazi.

9 For the record, we disagree with his interpretation of
10 TRIA. There are two steps in TRIA. You have to first find
11 it's blocked and then there's a second step on ownership, and
12 Judge Cote's decision in Calderon went into that in great
13 detail. I won't repeat all of the arguments now.

14 Your Honor, there's no reason to change the schedule
15 you had in place. We were set to file our motion to dismiss.
16 The plaintiffs were due to respond to Clearstream's motion.

17 THE COURT: Let's assume there's no rush. What is the
18 prejudice to you to having this issue decided?

19 MR. LINDSEY: I'm sorry?

20 THE COURT: What's the prejudice to you having this
21 issued decided in a format that plaintiffs want?

22 MR. LINDSEY: I'm not sure I quite understand which
23 issue he's talking about.

24 THE COURT: Let's find out. You're going to move for
25 partial summary judgment on what topic and relying on what

C31WdunC

1 facts?

2 MR. VOGEL: We're going to move for partial summary
3 judgment that the judgment creditors are collectively entitled
4 to a turnover order of the assets that are restrained at
5 Citibank and claiming that there are no issues of fact as a
6 result of the blocking order by President Barack Obama.

7 THE COURT: But what factual matters would you rely on
8 in your Rule 56 statement?

9 MR. VOGEL: The factual matters we would rely on are
10 that we have the right kind of judgment.

11 THE COURT: That's a legal thing. You have a
12 judgment.

13 MR. VOGEL: Yes. Correct. But it's also a fact that
14 we do have a judgment.

15 THE COURT: Yes.

16 MR. VOGEL: There are admissions in the affidavit of
17 Mr. Mazumi, who is an officer of Central Bank of Iran, that
18 indicate that they're the sole beneficial owner of the assets
19 that are restrained. I think he says it maybe ten times during
20 that affidavit that's already been submitted to the Court.
21 Citibank has blocked the assets, so that's one of the facts
22 that we need to prove. Iran is a terrorist party. They are a
23 terrorist party, we'll be able to prove that. That's a fact.
24 What else do we have to prove?

25 The rest of it is essentially legal issues that we

C31WdunC

1 have to show that the Central Bank, basically opposing all the
2 arguments that counsel want to make. We can do that in reply
3 papers on summary judgment motion.

4 THE COURT: In other words, they think they can get
5 the turnover order based upon these facts, which I don't know
6 if they're disputed or not, but if they're not --

7 MR. LINDSEY: We do have sovereign immunity arguments
8 we still intend to make and that we would make during the
9 motion to dismiss process. I'm not sure I understand why we
10 need an overlapping process of briefing the very same issues
11 that are going to be briefed on the motions to dismiss.
12 Everything he's talking about here --

13 THE COURT: If now his view entitles him to a
14 judgment, what's the prejudice or harm?

15 MR. LINDSEY: Your Honor, the money's not going
16 anywhere, that's for sure. So there's no prejudice if the
17 Court would like to give the parties a different structure, I
18 suppose, on how to address these arguments. But I don't see
19 why we need that. We had a perfectly good process in place.

20 THE COURT: We had a process in place because of the
21 problem that those arguments would potentially dispose of the
22 case, which I understand you now still say they will do. But
23 in order for plaintiffs to prevail, they were going to have to
24 marshal certain facts that were going to be disputed and do it
25 through discovery, and we didn't want that to have to happen

C31WdunC

1 when there were these threshold motions in place. If there's
2 overlapping on the issues, then I'm not sure what the advantage
3 is to putting off the plaintiff's briefing.

4 MR. LINDSEY: Your Honor, frankly, I'm not quite sure
5 what changed from when we came up with the motion to dismiss
6 schedule and today. The executive order did change some of our
7 arguments in our analysis but really hasn't changed much
8 anything else. Our major arguments are still there. We
9 haven't retreated from any of them.

10 THE COURT: I understand that. What I understand
11 changed, and I have not probed this in any great detail, but
12 what I understand changed is that the plaintiffs said in order
13 to get their turnover they were going to need certain factual
14 discovery and that was going to be disputed and I didn't want
15 to have that happen until we dealt with the threshold issues.
16 That's what's changed now.

17 MR. VOGEL: Correct.

18 THE COURT: That answers your question.

19 MR. LINDSEY: Your Honor, respectfully, I don't
20 believe the executive order had that change. But are we
21 talking about having discovery now?

22 THE COURT: No, no discovery.

23 MR. LINDSEY: No discovery? And so the motion for
24 summary judgment would overlie the motions to dismiss?

25 THE COURT: We'll figure out something.

C31WdunC

1 MR. PANOPOULOS: I mean, this is half cocked, and just
2 let me raise this with the Court.

3 Mr. Vogel misspoke. The restraints aren't in rem
4 proceeding. Turnover is a quasi in rem proceeding. In quasi
5 in rem, you need personal jurisdiction over defendants and
6 there are personal jurisdiction arguments here that haven't
7 been addressed yet. So the Court needs to be aware of that.

8 I want to figure out a way to do this, hearing what
9 you say, your Honor, about expediting the proceeding because if
10 what he says is true and it disposes of everything, most likely
11 the Court should hear it before it hears the other arguments,
12 let's say. But in our motion to dismiss, to lift the
13 restraints, which is made in the in rem proceeding of the
14 restraint, not in the turnover proceeding, and that's
15 important, we address the issue of TRIA, and we expected once
16 this executive order was issued for Mr. Vogel to address it in
17 opposition to our motion in the context of the restraints and
18 the proceeding that's in rem. And I think that if he wants to
19 make a motion or a limited application or argument with respect
20 to that, that's fine. But it should be done in the context of
21 opposing our motion to which we would reply and to which, you
22 know, Bank Markazi and even UBAE and Citibank would reply as
23 opposed to having a new summary judgment motion for turnover
24 which switches the proceeding from in rem to quasi in rem
25 without having any of the personal jurisdiction arguments

C31WdunC

1 before the Court decided, for one.

2 So it's fine to address the issue of the executive
3 order. I think it should be briefed. It's not only complex,
4 but it's a serious issue. It's an issue that at least in this
5 District Court there are competing opinions. The Second
6 Circuit will consider it at some point, so that's fine.

7 Another issue I'd like to raise is that if the motions
8 are scuttled, then we have other proceedings against us that
9 are pending that have been stayed until those motions are
10 resolved. So I would still want whatever Mr. Vogel is
11 proposing to be within the context of our motion and not
12 outside of it.

13 THE COURT: I just lost you. Scuttled?

14 MR. PANOPOULOS: In other words, if Mr. Vogel is
15 advocating, what he advocates in his letters is our motions are
16 moot and should be terminated and --

17 THE COURT: That's not what I propose. No one's
18 talking about scuttling your motion.

19 MR. PANOPOULOS: In that context, he can file an
20 opposition to our motion just on that limited issue, that's
21 fine. We have a briefing schedule, and then we would reply to
22 it.

23 THE COURT: Okay. What's the objection to him moving
24 for partial summary judgment?

25 MR. LINDSEY: Your Honor, if I may say, my client

C31WdunC

1 being a foreign sovereign, we believe the sovereign immunity
2 issue should be decided first before we're forced to respond to
3 summary judgment proceedings.

4 THE COURT: We're kind of back where we were. The
5 theory is because these arguments are threshold, there's no
6 point in reaching your summary judgment motion, but I guess the
7 prejudice you're now saying is you don't want to have to brief
8 the response without knowing that you're subject to the Court's
9 jurisdiction, is that it?

10 MR. LINDSEY: Correct, your Honor.

11 THE COURT: That's some prejudice.

12 MR. VOGEL: Your Honor, the only issue that the
13 Central Bank of Iran is going to be raising is whether 1611
14 immunity applies or not. There's case law, admittedly it's
15 only a District Court case here in the Southern District, that
16 says sovereign immunity is gone as a result of TRIA and the
17 argument they want to make is no longer effective.

18 THE COURT: I don't want to deal with the merits,
19 Mr. Vogel. Stay off the merits.

20 MR. VOGEL: That's fine, but my point is that the
21 Central Bank of Iran is free to make that argument within the
22 context of a summary judgment motion. They're either right and
23 they win or they're wrong and they lose.

24 THE COURT: They're saying they don't want to have to
25 do it until we reach their threshold issue, correct?

C31WdunC

1 MR. LINDSEY: On the sovereign immunity.

2 MR. VOGEL: But that's the only issue they would be
3 arguing. There's really nothing else to argue.

4 MR. LINDSEY: Your Honor, that's not true. We have
5 other arguments.

6 THE COURT: Nonsovereign immunity.

7 MR. LINDSEY: We have arguments other than 1611 to
8 make. Treaty of amity arguments, motions to make in our motion
9 to dismiss that we do believe that the sovereign immunity
10 issue, as a matter of law, must be decided first before we are
11 forced to involve ourselves in the litigation process in the
12 United States.

13 MR. COLELLA: May I be heard very quickly.

14 THE COURT: Why don't you identify yourself for the
15 benefit of the record.

16 MR. COLELLA: Ugo Colella.

17 If they're going to seek summary judgment, we have our
18 personal jurisdiction motion which has been pushed off into no
19 man's land -- at this point, we're on hold -- would be a live
20 issue, if they're going to seek summary judgment against us.
21 If we're going to go down the road of summary judgment, we
22 would want to brief our motion for personal jurisdiction as
23 well.

24 MR. VOGEL: Your Honor, we do not intend to make a
25 summary judgment motion against UBAE or the related claim

C31WdunC

1 against Clearstream, which relates solely to \$250 million
2 claim.

3 THE COURT: It's just against Markazi.

4 MR. VOGEL: It is against the restrained assets.

5 THE COURT: Assets.

6 MR. VOGEL: That's correct.

7 THE COURT: And it's a turnover proceeding.

8 MR. VOGEL: Correct, which is, under New York State
9 law, supposed to be a summary proceeding expedited, and I
10 realize that this is fairly expedited because of the complexity
11 of sovereign immunity because it has been over three years.

12 THE COURT: So it's really down to you. You're the
13 only one he wants summary judgment against, and your point is I
14 shouldn't have to deal with it.

15 MR. LINDSEY: That's correct, your Honor. And the law
16 is fairly clear, your Honor, that the Court should take up that
17 issue first. And, your Honor, by the way, if I may say, we
18 were going along in an orderly process before now. I continue
19 to believe nothing's changed and we should just continue with
20 the scheduling order.

21 THE COURT: I understand that. There's some force to
22 it. The thing that has changed is it wasn't merely the fact in
23 my mind of foreign sovereign immunity, but whatever motion
24 plaintiffs were contemplating seemed to involve discovery. So
25 something has changed, but not everything, in my mind.

C31WdunC

1 MR. LINDSEY: If I may say, your Honor, our motion to
2 dismiss will have no affidavits attached. There are no factual
3 issues in dispute. So I want to make that clear on the record.

4 THE COURT: Go ahead.

5 MR. PANOPOULOS: One other matter. I mean, there's
6 also the issue of the standard because on a motion for summary
7 judgment, right, the plaintiff is given inferences that are in
8 their favor. But on a motion to lift the restraint, you don't
9 have that. The Court has to make a factual determination on
10 disputed facts. Now, here, we don't have disputed facts
11 because, as we said in October, Clearstream has agreed,
12 assuming that what plaintiffs allege is true, we still win on
13 the law, although there are some facts that even as the courts
14 say speak for themselves, for example, that the accounts
15 weren't opened in New York. I would think the Court needs to
16 keep that in mind as well if it's going to allow Mr. Vogel to
17 make a summary judgment motion, even if it's limited, as
18 opposed to some sort of motion within the parameters of our
19 motion to lift the restraints, which is what I would ask the
20 Court to do instead, rather than summary judgment.

21 THE COURT: Mr. Vogel.

22 MR. VOGEL: Your Honor, if I may just answer
23 Mr. Lindsey's point about sovereign immunity being a
24 preliminary issue, I will point out that in two cases the issue
25 of sovereign immunity was decided in the context of a summary

C31WdunC

1 judgment motion by the plaintiffs, and one of them went up to
2 the Second Circuit and was approved. One case is the
3 Weininger case, which is only a Judge Marrero case here, 462
4 F.Supp.2d, and the other is the Weinstein case, which went up
5 to the Second Circuit, that was brought on by the plaintiff as
6 a motion to appoint a receiver to sell property, and the bank
7 moved to dismiss in that case on the theory that there was an
8 instrumentality of the state and there was a bank SEC issue
9 involved and that was a foreign sovereign immunity issue as
10 well, and the judge didn't make a preliminary finding as well
11 but decided them together in one motion, one decision.

12 MR. BERNARD: If I may suggest a way forward, your
13 Honor.

14 THE COURT: Okay. Why don't you identify yourself
15 again.

16 MR. BERNARD: James Bernard, from Stroock, on behalf
17 of the plaintiffs Greenbaum and Acosta.

18 I think as your Honor was indicating earlier in
19 connection with not wanting to get into the merits, there was a
20 dispute between parties as to whether or not counsel is correct
21 that the foreign sovereign immunity issue needs to be decided
22 first, and, therefore, I would suggest let us make our summary
23 judgment motion --

24 THE COURT: That I've decided already, that it was
25 going to be made first. We had an argument about that, didn't

C31WdunC

1 we?

2 MR. BERNARD: No, I believe that's the argument that's
3 being made right now.

4 THE COURT: No, no, no. Months ago.

5 MR. BERNARD: I'm sorry. I meant the specific foreign
6 sovereign immunity argument counsel is referring to under 1611,
7 that issue that's just being raised. My point simply being,
8 your Honor, we could make our summary judgment motion and if
9 they want to say in opposition to that, Judge, before you
10 decide anything else that needs to be argued decide this issue,
11 we have the opportunity to say, no, Judge, you don't need to do
12 that and rather than getting into that on the merits today, we
13 can get into that in the context of the brief.

14 THE COURT: I lost you. You file this motion and they
15 say no, we've been on sovereign immunity, we don't have to
16 answer, they don't have to answer? I lost you.

17 MR. BERNARD: They would not answer at that point if
18 that's the position they want to take. Clearstream, I imagine,
19 your Honor, would also oppose that summary judgment motion and
20 make all the arguments it wants to make about the UCC and
21 everything else in which case all of the issues would come at
22 one place at one time as opposed to in separate pieces.

23 THE COURT: General moving against Markazi?

24 MR. BERNARD: That's the point Mr. Vogel is making.
25 It's against the asset. As counsel said, it's an in rem

C31WdunC

1 proceeding. It's a summary judgment motion with respect to the
2 assets. If Clearstream has an argument it wants to make with
3 respect to the assets, it can make that argument. If Bank
4 Markazi wants to make a motion or oppose the motion with
5 respect to the assets --

6 THE COURT: But it wants to make these threshold
7 motions without dealing with it on the merits.

8 MR. BERNARD: I understand that. My point is it's
9 disputed whether they should be entitled to do that because as
10 Mr. Vogel just said there are at least two cases that he's
11 already identified where these issues do get addressed all at
12 once. They don't get the right to split it up. And the reason
13 why that's important, and it's not just abstract, Judge, to put
14 this in the real world, we represent plaintiffs who have
15 judgments who are looking for justice, who want to get their
16 judgments satisfied. I understand these proceedings take time.
17 Our clients have been waiting for three years. These assets
18 have been blocked.

19 Our clients want to be able to seize those assets to
20 satisfy their judgments, and my concern is that if we split
21 this briefing up and then counsel says he wants to be able to
22 take the issue up to the Second Circuit and, Judge, stay
23 everything else while I take the issue of sovereign immunity up
24 to the Second Circuit, we might be here for another three years
25 before the plaintiffs in this case are entitled to recover

C31WdunC

1 those assets. So my suggestion is since it is disputed like
2 all the other disputed issues we've been talking about, let
3 them all get briefed. We'll move for summary judgment because
4 of the assets. Clearstream will say no, because of this UCC
5 argument. Markazi will say no, we're entitled to sovereign
6 immunity and the assets belong to us, and if the Court decides,
7 looking at the papers, that the Markazi issue should be after
8 it sees our opposition to that, then we've litigated that issue
9 and we've lost. But let's not decide that how.

10 THE COURT: How is this any different from what
11 Mr. Vogel is proposing?

12 MR. BERNARD: It's not different from what Mr. Vogel
13 was proposing.

14 THE COURT: I thought you had some third way. You set
15 me up.

16 MR. BERNARD: Obviously what I was trying to avoid.
17 It's not at all different from what Mr. Vogel was
18 saying. What I'm concerned with is Markazi has asked of this
19 Court that they be allowed to brief something separately with
20 something else the Court was entertaining and I respectfully
21 suggest the Court shouldn't entertain it, that anybody who
22 wants to oppose that summary judgment motion should have to do
23 so at the same time. There shouldn't be some staging of
24 opposition to the summary judgment motion.

25 THE COURT: I think we're still where we are, and this

C31WdunC

1 is a balancing of the desire of folks to move this along and
2 the prejudice that's being claimed to having to brief something
3 when there's some threshold issue that you think is going to
4 obviate the need for me to reach that motion. Of course, if
5 you're right, I wouldn't reach the motion, but you would still
6 have had to brief it. It doesn't seem like a terribly strong
7 interest. I'll give you another shot at it.

8 MR. LINDSEY: Your Honor, I'm sorry I haven't been
9 able to persuade you up to now. All these issues are being
10 addressed now before the Court and these motions to dismiss.

11 THE COURT: Right.

12 MR. LINDSEY: And the schedule you created with all of
13 us in the room last October, whenever it was, and we sat in
14 this room and we came up with this schedule, and, your Honor, I
15 would propose nothing has changed that changes or that should
16 change that schedule, that we would have the motions to dismiss
17 and responses and replies and the threshold issues would be
18 decided. Nothing has changed to make us suddenly need an
19 overlaying of motion for summary judgment. It appears to me,
20 your Honor, too, that I guess the motion, both motions, motions
21 to dismiss and motions for summary judgment are going to
22 address some of the same issues. It's not quite clear to me
23 how this is going to work. I don't know why we need the
24 overlapping process.

25 THE COURT: They're going to address some of the same

C31WdunC

1 issues. This is their point. This is why this is not
2 prejudicial to you, in their view.

3 MR. LINDSEY: Your Honor, it is prejudicial for us
4 because we are having to participate in the litigation process,
5 have a whole different round of briefing.

6 THE COURT: No, but if it's the same issues --

7 MR. LINDSEY: It's hard to say now until I see their
8 papers. It could be some of the same issues. But, your Honor,
9 there's really no reason to take that step now. It's not going
10 to accomplish anything that we're not accomplishing already.

11 THE COURT: What it accomplishes is in the event
12 you're wrong under threshold issues, it puts the case in a much
13 more advanced stage than it would be.

14 MR. LINDSEY: There are a number of issues that will
15 be decided at the end of the motions to dismiss. Once those
16 are decided, this will be a very narrow case, a very narrow
17 case. There won't be a whole lot to decide after that
18 probably.

19 THE COURT: If you win.

20 MR. LINDSEY: No.

21 THE COURT: Either way.

22 MR. LINDSEY: Either way it's going to be a pretty
23 narrow case.

24 THE COURT: And they want to plug the hole in that
25 narrow case by being geared up for their summary judgment.

C31WdunC

1 MR. LINDSEY: I'm not quite sure I understand, your
2 Honor.

3 THE COURT: If you lose, they want to have the
4 briefing already out there as to that narrow piece that's left.

5 MR. LINDSEY: It's a proposal, your Honor, that we
6 would file these papers and then you would first decide the
7 motions to dismiss?

8 THE COURT: I assume as a logical matter, I would have
9 to.

10 MR. LINDSEY: Okay.

11 THE COURT: They may end up briefing something for
12 nothing because it turns out you're right, if they're willing
13 to take that risk apparently.

14 MR. LINDSEY: We would have to respond, of course, to
15 their briefs.

16 THE COURT: I understand that. We're going in circles
17 at this point. You have to respond and then you're telling me
18 how it's all the same issues anyway. I'm saying who cares.

19 MR. LINDSEY: Your Honor, to be clear, I'm not saying
20 it's all the same issues. They're not mirror images, and I'm
21 not sure until I see the papers. Certainly they're talking
22 about having to address sovereign immunity in the context of a
23 motion for summary judgment. We're already addressing
24 sovereign immunity in a context of a motion to dismiss.

25 THE COURT: Here's my ruling. Let's have a motion

C31WdunC

1 schedule that doesn't slow down your motions, allows them to
2 file their motion, if you want to come back after that, and
3 we'll have you respond. If, for some reason, the motion isn't
4 what you think it is and it's creating some burden that you
5 think you could make a case to me you shouldn't have to respond
6 to it, I'll let you come back.

7 MR. LINDSEY: Thank you, your Honor.

8 THE COURT: But writing a 20-page memo of law is not
9 going to be the kind of burden I'm talking about.

10 MR. COLELLA: Your Honor, on behalf of Banca UBAE, I
11 just want to also seek clarification from the Court. To the
12 extent that they file a summary judgment motion and those
13 issues might, and they don't seek summary judgment against
14 UBAE, but some of the factual issues they want to establish in
15 summary judgment might impact the UBAE claim, we would then, so
16 long as we're included in what your Honor just said, seek leave
17 to file our personal jurisdiction motion. In other words,
18 there could be facts that overlap.

19 THE COURT: If you have a defense to the summary
20 judgment motion based on personal jurisdiction, is that what
21 you're saying?

22 MR. COLELLA: No, that the facts that they want to
23 establish on the claims against Markazi could bleed into the
24 claims that they have just against Clearstream and UBAE. We
25 would seek leave to file a personal jurisdiction motion if

C31WdunC

1 that's the case.

2 THE COURT: Come back. We'll deal with it later when
3 we have to deal with it. At the end of the day, I can say
4 we're going to reserve on the summary judgment motion. That's
5 a possibility too. I just want to give them a chance.

6 MR. COLELLA: I just want to make sure we're within
7 the scope of what your Honor just said about Bank Markazi, that
8 if they see something that causes them pause, they have the
9 ability to come back to you.

10 THE COURT: Sure. Anybody can come back to me. How
11 is that?

12 MR. COLELLA: I'm just preserving our rights. That's
13 all.

14 THE COURT: Yes. I'm giving it to you.

15 MR. PANOPOULOS: So if I understand it correctly, then
16 Clearstream's motion will be stayed until he files his motion.

17 THE COURT: Would be stayed, or we would have a
18 different response time?

19 MR. PANOPOULOS: We've put in our motion. It's up to
20 them to put in an opposition.

21 THE COURT: One thing I wondered about is whether the
22 order affected any of the existing motions.

23 MR. PANOPOULOS: It did. The existing motions have
24 now been put on hold.

25 THE COURT: No. I meant the merits of the arguments

C31WdunC

1 in the motions.

2 MR. PANOPOULOS: Conceivably.

3 THE COURT: Should we have rebriefing?

4 MR. PANOPOULOS: We don't need rebriefing because our
5 briefing still stands.

6 THE COURT: That's my question. Does anyone else need
7 to rebrief something that's already in, or is it all absolutely
8 the way it was before?

9 MR. PANOPOULOS: We're the only ones in, your Honor.

10 THE COURT: You're the only ones who filed a brief so
11 far?

12 MR. PANOPOULOS: Yes.

13 THE COURT: And you want to stick with it?

14 MR. PANOPOULOS: Yes, assuming we get a reply to their
15 opposition or at least on the limited issue they're raising,
16 obviously we would say something about it too.

17 THE COURT: I'm not saying you're bound by the
18 arguments. I just meant you were happy with the brief now
19 despite the blocking order.

20 MR. PANOPOULOS: Yes, yes, yes.

21 I guess we need clarity because we're still unclear,
22 your Honor. We have a briefing, right? And what I understand
23 is that Mr. Vogel doesn't want to respond to our brief. He
24 just wants to make one argument that we touch upon in our
25 brief, but because we don't have the full argument, we couldn't

C31WdunC

1 address it in full, and we would reply in any event if he
2 didn't oppose it.

3 THE COURT: I didn't understand that at all.

4 MR. PANOPOULOS: We put in a brief.

5 THE COURT: No, I didn't understand that he said that
6 at all. You put in a brief moving --

7 MR. PANOPOULOS: To lift the restraints. And we
8 addressed five or six arguments. One of those arguments was
9 the TRIA argument. That was before the executive order. What
10 I understand Mr. Vogel to be saying is that he just wants a
11 motion for summary judgment for turnover, just on the issue of
12 the TRIA argument and not on the UCC arguments that we made.

13 THE COURT: Let's ask him.

14 Do you want to oppose on the various other arguments,
15 or not?

16 MR. PANOPOULOS: Your Honor, I have not thought about
17 Clearstream's arguments, if they fell at all within the TRIA
18 argument because this is fresh, it just came down February 6,
19 and how and whether Clearstream's points survive because of
20 TRIA and the blocking order.

21 THE COURT: My view is you have to respond to his
22 arguments, however you wish.

23 MR. PANOPOULOS: He says here that it moots our motion
24 to lift the restraints, so obviously he must have thought of
25 it.

C31WdunC

1 THE COURT: He's entitled to oppose on any basis he
2 wants, but you can't ignore their arguments because if you
3 don't oppose them, I'll assume they're valid, and you may lose
4 on them. He's going to oppose your arguments.

5 MS. ERB: In a motion.

6 THE COURT: In an opposition.

7 MR. VOGEL: What it moots is relief.

8 THE COURT: That could be a basis. You could oppose
9 this motion on any basis you want.

10 MR. VOGEL: That's fine. We could do that in the
11 context of our summary judgment.

12 THE COURT: I'd like it to be done in an orderly way,
13 which means if someone moves to lift the restraints, I need an
14 opposition from you that addresses exclusively that motion.

15 MR. VOGEL: That's fine.

16 THE COURT: At the same time, you may if you wish in a
17 separate brief say here's our motion for summary judgment, we
18 rely on points two and three, however you want to do it, or in
19 full. I don't care, but you need to separately address the
20 motions that are coming down.

21 MR. VOGEL: Okay.

22 THE COURT: That was my vision of this.

23 MR. VOGEL: I understand. I'm will.

24 THE COURT: I'm willing to add your summary judgment
25 on top of this. If you want to put it in the middle, put it in

C31WdunC

1 the middle.

2 MR. VOGEL: I understand your vision, your Honor, and
3 I suppose that if TRIA didn't exist, an alternative argument we
4 would have is the old argument that we asserted, so therefore
5 Clearstream's brief would be relevant to that. So in that
6 context, we will respond to it.

7 THE COURT: And to the extent that some argument is
8 only relevant if you lose on some other argument, everybody
9 better make this very clear in their briefs so I understand
10 what the structure of the argument is.

11 MR. VOGEL: As clear as humanly possible under the
12 circumstances, yes, we will.

13 THE COURT: Good. So I'm back to where I was. As far
14 as I'm concerned, your structure on the briefing schedule
15 remains in place. All we're doing is adding their ability to
16 file on whatever schedule you want to work out now or you folks
17 want to work out on your own. Should we try to do this now
18 with dates brief by brief?

19 MR. LINDSEY: Yes.

20 THE COURT: Is that the better way to do it?

21 MR. LINDSEY: Your Honor, if I may, according to the
22 schedule, when it was stayed, the next event was the
23 plaintiffs' response to Clearstream's motion to lift the
24 restraints. And then two days after that was our motion to
25 dismiss.

C31WdunC

1 THE COURT: Markazi's motion to dismiss?

2 MR. LINDSEY: Yes, sir.

3 I spoke to Mr. Vogel just before this hearing a few
4 days ago, and he agreed that we would file our motion to
5 dismiss on March 15, if that's agreeable with the Court.

6 THE COURT: I'm looking at your February 21 letter, so
7 I'm now adding a week to it?

8 MR. LINDSEY: Yes, sir.

9 THE COURT: But before we get to that, the plaintiff
10 was going to respond to Clearstream's motion.

11 MR. LINDSEY: Correct. It was like three days before
12 our motion to dismiss.

13 THE COURT: When do you want to respond to
14 Clearstream's motion now?

15 MR. VOGEL: We can do the 12th, your Honor.

16 THE COURT: March 12.

17 MR. VOGEL: Assuming that's a weekday. I don't have a
18 calendar in front of me.

19 THE COURT: Plaintiffs' response. What's the next
20 thing, Bank Markazi's motion to dismiss?

21 MR. LINDSEY: On the 15th.

22 THE COURT: March 15.

23 MR. LINDSEY: Yes, sir.

24 THE COURT: Then plaintiffs and third-party
25 respondents' opposition April 17, just adding a week to your

C31WdunC

1 proposal.

2 MR. LINDSEY: Yes, your Honor. That's fine.

3 MR. PANOPOULOS: April 17 is when we would reply to
4 the opposition.

5 THE COURT: No. It's plaintiffs' and third-party
6 respondents' opposition to Bank Markazi's motion to dismiss. I
7 don't think we got to Clearstream's reply because it's not on
8 your schedule. I don't know what the original schedule was for
9 Clearstream's reply.

10 When does Clearstream want to reply?

11 MR. PANOPOULOS: April 12, your Honor.

12 THE COURT: And then back to Markazi's reply would be
13 May 10, working off your schedule and adding a week. Those
14 were the only two motions originally?

15 MR. VOGEL: Correct.

16 THE COURT: Clearstream and Markazi, right?

17 MR. LINDSEY: Yes. That would be the motion to
18 dismiss schedule.

19 THE COURT: How do you want to insert summary judgment
20 into this? By the way, when was Clearstream's reply? I didn't
21 write it down.

22 MR. LINDSEY: I have April 12, but I'm not sure what
23 day of the week that is.

24 THE COURT: Thursday.

25 MS. ERB: Can we make it Friday?

C31WdunC

1 MR. PANOPOULOS: Friday, the 13th, your Honor.

2 MR. VOGEL: Sorry. What was that date?

3 THE COURT: April 13, for Clearstream's reply.

4 MR. PANOPOULOS: To your opposition.

5 MR. VOGEL: You changed it from the 12th?

6 MS. ERB: From a Thursday to a Friday.

7 THE COURT: Do you want to overlay? Do you want to do
8 it after? What do you want to do?

9 MR. VOGEL: April 1, your Honor.

10 THE COURT: April 1 for plaintiffs' motion.

11 Who is going to be responding to this? Which parties?
12 Clearstream? You don't know yet? Okay. May 1 for opposition.
13 Is that a weekday? Anyone know? In the old days, we used to
14 have calendars. Let's assume it's a weekday. If not, whatever
15 the weekday is after that, and then three weeks later for
16 reply. May 22, assuming we're not adjusting for weekday. I
17 think that was the only business before we get to the 4:00
18 proceeding, which is the sealing issues.

19 Is there anything else before we get to that?

20 MR. LINDSEY: No, your Honor.

21 MR. BERNARD: Nothing further.

22 THE COURT: I think what I have to do for this piece
23 is ask everyone to leave who did not file a brief or a letter.
24 I think the briefs cover the letters. I don't know who is in
25 the audience there. Don't we need to do that?

C31WdunC

1 MR. LINDSEY: Your Honor, if I may, while we did not
2 file it ourselves, we worked with the other defendants in
3 putting that letter together.

4 THE COURT: I'm sorry. Who are parties to the letter?
5 Maybe you didn't sign in. Everyone who hasn't spoken is going
6 to have to be vouched for by someone who isn't here. Let's
7 take a break.

8 (Proceedings adjourned)